2020-05-04

Matter of Pena v. Division of Hous. & Community Renewal

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2020 NY Slip Op 31227(U)
May 4, 2020
Supreme Court, Kings County
Docket Number: Index No. 519607/2018
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of May, 2020.

PRESENT:

HON. KATHY J. KING,
Justice.

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In the Matter of the Application of
RUBEN PENA,

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules,

- against -

Index No. 519607/18

DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

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The following papers numbered 1 to 5 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Record before DHCR	5

Upon the foregoing papers, petitioner, Ruben Pena, seeks a judgment under Article 78 reversing, annulling, and setting aside the Petition for Administrative Review ("PAR") denial to the extent it denied petitioner's application for exemption under Section 2520.11(e) of the Rent Stabilization Code. Respondent opposes petitioner's motion.

judicial review, under Article 78 of the Civil Practice Law and Rules, of an order issued by respondent, Division of Housing and Community Renewal ("DHCR") dated August 1, 2018, denying petitioner's application for exemption from rent regulation

BACKGROUND

Petitioner in the within Article 78 proceeding seeks an exemption of the subject apartment building located at 940 Flushing Avenue in Brooklyn, New York from rent regulation. By deed dated May 26, 1995, petitioner took title to the subject apartment building at 940 Flushing Avenue in Brooklyn, New York. On August 20, 2015, petitioner filed an application with the DHCR to determine whether the building was exempt from the Rent Stabilization Law and Code. In the application, petitioner alleged that the apartment building was vacant when he purchased it in 1995, and that it was gutted and renovated between 1996 and 1998, in order to completely or substantially rehabilitate the apartments as family units. In support of his application, petitioner submitted a note or "I-Card" from the records of the Department of Housing Preservation and Development (HPD) indicating that the interior of the building was "demolished" as of October 5, 1982, as well as copies of cancelled checks for the alleged rehabilitation work. Additionally, petitioner submitted photographs of the alleged installations of bathrooms, kitchens, staircases, fire escapes, windows, walls, flooring and moldings and Department of Building (DOB) permits authorizing the alleged renovation work.

By order dated October 17, 2017, the Rent Administrator ("RA") denied petitioner's application, finding that petitioner did not demonstrate that at least 75% of the building-wide and individual apartment systems were replaced. Citing that there was no proof of architectural plans, sign-offs, architect's affidavit, completion letter, new Certificate of Occupancy ("CO") or any

other evidence to prove the renovations were in compliance with building codes and requirements pursuant to DHCR Operational Bulletin 95-2, the RA denied petitioner's application since there was no documentary evidence to establish any further proof of renovations. The RA noted that the evidence submitted by petitioner in support of his argument failed to indicate that the alleged improvements made to the premises complied with DOB code and requirements.

Petitioner subsequently filed a PAR, wherein he argued that the subject building was an "empty shell" when petitioner took title and, virtually 100% of building systems needed replacement for the subject building to become habitable. Petitioner further argued that he was not required to demonstrate that 75% of building wide and individual apartment systems were replaced since all the apartments were "newly created." Alternatively, petitioner argued that even if the 75% rule applied, he replaced nearly 100% of the premises. The RA claimed that DOB records do not show adequate work and noted that no new Certificate of Occupancy (CO) was issued. Petitioner disagrees and contends that a new CO was not required, the number of apartments created did not exceed what was permitted by the existing CO.

By order dated August 1, 2018, the DHCR denied petitioner's PAR. DHCR found that it was reasonable for the RA to require submission of records for proof of the alleged renovation to the premises as required by OB 95-2, which outlines criteria owners must meet to prove substantial rehabilitation. DHCR also found that petitioner failed to submit such records to show proof of the renovations including DOB filings, architect/engineer plans, certificate of occupancy and letter of completion in support of his argument. Therefore, DHCR ruled that petitioner's exemption claim was without merit. Thus, petitioner was not entitled to deregulate the building

based upon substantial rehabilitation. Thereafter, the petitioner brought the within Article 78 proceeding.

DISCUSSION

STANDARD OF REVIEW FOR ARTICLE 78 PROCEEDING

A court's function in an Article 78 proceeding is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious (*see Pell v Bd. of Educ.*, 34 NY2d 222, 230-231 [1974]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.* at 231). If a rational basis exists for its determination, the decision of the administrative body must be sustained (*see Id.* at 230; *Matter of Jamaica Estates, LLC v New York State Div. of Hous. & Community Renewal*, 78 AD3d 1053, 1054 [2d Dept 2010]; *Matter of Tener v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 159 AD2d 270 [1st Dept 1990]). Stated simply, this court "may not substitute its judgment for that of the [DHCR]," so long as the agency's decision is rationally based in the record (*Matter of 85 E. Parkway Corp. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 675, 676 [2d Dept 2002]). Regarding fact-based inquiries, an administrative agency may determine the type of documentation necessary or appropriate (*see Matter of Rodriguez v County of Nassau*, 80 AD3d 702, 702 [2d Dept 2011]).

Petitioner contends that the DHCR's determination is arbitrary and capricious in that the agency ignored the DOB "I-card" indicating that the building was demolished in 1982. Petitioner claims that the agency determination that petitioner failed to show that 75% of building and apartment systems were rehabilitated did not consider the fact that the apartments in

the subject building were "newly created" from the demolished building and not merely "substantially rehabilitated". Petitioner further argues that even if the 75% rule applied, he demonstrated that nearly 100% of the building and apartment systems were replaced and that the DHCR irrationally required proof which exceeds that required by the Rent Stabilization Code (RSC) and OB 95-2. Finally, petitioner maintains that the DHCR's determination was not supported by "substantial evidence" and that petitioner was denied due process.

Housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974 are exempt from rent stabilization pursuant to RSC [9 NYCRR] §2520.11(e). In order for a building to be exempt from rent stabilization, the regulation requires the following relevant criteria: (1) at least 75% of building-wide apartment systems must be completely replaced, all ceiling, flooring and wall surfaces in common areas must be replaced, and ceiling wall and surfaces in apartments if not replaced, must be made as new; (2) the building must have been substandard or in seriously deteriorated condition; and (3) the work must comply with DOB codes and requirements and the owner must submit a Certificate of Occupancy before and after the substantial rehabilitation.

Section "III" of OB 95-2 requires owners to submit documentation in support of their substantial rehabilitation claim, including: (1) description of replacements and installations; (2) copies of approved DOB building plans; (3) architect or general contractor statements; (4) contracts for work performed; (5) new Certificate of Occupancy; and (6) photographs of conditions before, during, and after the work was performed.

Here, the court finds that DHCR's determination is neither arbitrary nor capricious as it rationally determined that petitioner was not exempt from rent regulation based on petitioner's

failure to provide adequate documentary support of a substantial rehabilitation. The Court finds that the record lacked approved architectural/engineering plans, permits, sign-offs, an expert affidavit, CO, or Letter of Completion in accordance with Section "III" of OB 95-2.

While petitioner offered several cancelled checks referring to certain renovations to the subject building, there is no substantiation, such as an architect or contractor statement, to prove that the work referenced in the checks was actually performed at the subject property, or that the work conformed with the requisite DOB code and requirements. Additionally, the photographs submitted to the DHCR by petitioner purport to show only the finished renovations allegedly performed, and there are no photographs depicting the condition of the building before the renovation or which show the completed renovations to establish proof of a substantial rehabilitation, pursuant to Section "III" of OB 95-2. DOB records also show that there were open violations on the building. Additionally, DOB records indicate that petitioner's plans and application for "Converting Existing Restaurant, Store and Seven Family Dwelling units to Restaurant and Six Class A Multiple Dwellings" were withdrawn on June 6, 2007. Accordingly, based on a review of the record, the Court finds that DHCR's determination that petitioner failed to meet the criteria to establish a substantial rehabilitation pursuant to Section "III" of OB 95-2 was not arbitrary and capricious.

The Court also finds that DHCR rationally determined that petitioner failed to establish that the units were newly created pursuant to RSC [9 NYCRR] §2520.11 (e). Petitioner's reliance upon the I-card as proof of the newly constructed apartments within the subject building is without merit as the I-card merely establishes that the building was originally demolished. To the extent petitioner relies on the cases of *Bartis v Harbor Tech, LLC* (147 AD3d 51 [2d Dept

2016]) and *22 CPS Owner LLC v Carter* (84 AD3d 456 [1st Dept 2011]), those matters involved conversion of entirely commercial properties into residential properties, thus establishing that residential apartments were "newly created" pursuant to RSC [9 NYCRR] § 2520.11 (e). Further, petitioner's claims that the subject building was renovated with newly constructed apartments is unsubstantiated, since the record shows petitioner withdrew his application to convert the building on June 6, 2007. Therefore, DHCR's determination that petitioner failed to meet the criteria set forth pursuant to RSC [9 NYCRR] § 2520.11 (e) to establish at least 75% of building-wide apartment systems were newly created within the subject building was not arbitrary and capricious.

Finally, petitioner's claims that he was denied due process is unavailing. "In the context of a DHCR proceeding, where the determination is based upon evidentiary submissions by the parties, 'due process requires . . . that reasonable notice be afforded to the parties to a proceeding and that they have an opportunity to present their objection'" (*Matter of Greenwich Leasing, LLC v Division of Hous. & Community Renewal*, 91 AD3d 949, 950 [2d Dept 2012]. Petitioner failed to establish its denial of due process as there is no contention by petitioner that he was not afforded proper notice of this proceeding or that he was denied an opportunity to present evidence before the RA. Therefore, petitioner's claim he was denied due process is without merit.

Based on the foregoing, the petition is denied in its entirety.

ENTER,

HON. KATHY J. KING
J.S.C